NO. 31451-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent.

vs.

DANNY WAYNE EVANS,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. THE TRIAL COURT'S RULING THAT THE DEFENDANT'S DENIAL OF OWNERSHIP OF THE BRIEFCASE CONSTITUTED AN ABANDONMENT OF PROPERTY VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, §7 OF THE WASHINGTON CONSTITUTION.

2. THE TRIAL COURT ERRED BY CONCLUDING THAT DETECTIVE COWAN'S OMISSION OF THE INFORMANT'S CRIMES OF DISHONESTY FROM HIS AFFIDAVIT DID NOT MATERIALLY AFFECT THE FINDING OF PROBABLE CAUSE.

3. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT UNDER RCW 69.50.401(a)(1)(ii) WHERE THE JURY WAS NOT ASKED TO SPECIFY WHICH SUBSTANCE WAS ATTRIBUTED TO THE DEFENDANT'S ACTS THEREBY VIOLATING THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATE'S CONSTITUTION.

4. THE STATE VIOLATED THE DEFENDANT'S FIFTH AMENDMENT RIGHTS BY ELICITING TESTIMONY THAT THE DEFENDANT EXERCISED HIS RIGHT TO REMAIN SILENT.

Issues Pertaining to Assignments of Error

1. Does a defendant's denial of ownership constitute abandonment?

2. Does omission of a named informant's convictions for crimes of dishonesty materially effect the finding of probable cause?

3. For purposes of sentencing under RCW 69.50.401, does the Sixth Amendment require that the jury make a specific finding as to whether the substance attributed to the defendant's acts is methamphetamine, as opposed to its salts, isomers, or salts of its isomers?

4. Are the Fifth Amendment rights of an accused violated where the

State purposefully elicits testimony from an officer that the defendant refused to answer specific questions about his involvement in the crimes being investigated?

STATEMENT OF THE CASE

From late September through mid-November, 2002, Deputy Merkle of the Cowlitz County Sheriff's Office was investigating Gary Lindsey for a felony theft. CP- 74. On October 23, 2002, Deputy Brightbill of the Cowlitz County Sheriff's Office arrested Gary Lindsey for attempted burglary. CP- 50. Mr. Lindsey wanted to make a deal. Id. Mr. Lindsey alleged that he had purchased a controlled substance from Danny Evans, herein the Defendant, and "Scott" at "this dwelling/structure" behind 1101 Cowlitz Way. Id.

Officer Cowan relayed this information directly to Sue Baur, the Prosecuting Attorney for Cowlitz County, and Ms. Baur spoke to Deputy Brightbill. CP-50-51. Ms. Baur made a deal with Lindsey to reduce his attempted burglary charge to trespass if he became a police informant. Id. The affidavit given in support of the warrant does not identify Gary Lindsey other than by giving his name. CP-50-51. The affidavit did not include Lindsey's criminal history which consists of six (6) counts of Forgery; two (2) counts of Theft in the Second Degree. CP-50-51, 85. Based upon the information provided by Gary Lindsey, Det. Cowan obtained a search warrant, and on October 23, 2002, agents from the Cowlitz-Wahkiakum Task Force executed the search warrant at 1101 ½ Cowlitz Way in Kelso, Cowlitz

County, Washington. RPI 50. 1101 ½ Cowlitz Way is a converted garage behind the residence at 1101 Cowlitz Way. RPII 60. Both the residence and the converted garage are owned by Danny Evans, however, the residence is rented out to Bryan Kerr. Id. During the execution of the search warrant, Danny Evans was placed under arrest. RPI 51.

Sgt. Tate then initiated contact with the Defendant who was seated in the back of a patrol car. RPI 54 - 55. The Defendant acknowledged that he has been read his *Miranda* warnings and understood them. RPI 56. The Defendant told Sgt. Tate that he "didn't want to talk about any details", and " you guys - - the police[,] are gonna do what the police are gonna do, and I don't want to talk about it." Id.

Sgt. Tate then talked to the Defendant about the Defendant's truck and asked for permission to search it. Id. Sgt. Tate explained to the Defendant that his truck was not included in the search warrant and without the Defendant's permission to search, he could not without obtaining another warrant. RPI 56 - 57. The Defendant clarified with Sgt. Tate that all Sgt. Tate wanted to do was a limited search of the truck, and the Defendant agreed so long as he could be present during the search and object to anything that was occurring.

RPI 59.

The Defendant was then walked over to the truck while Sgt. Tate executed a search. RPI 59-60. During the course of the search, Sgt. Tate located a silver briefcase on top of a stack of items in the back seat of the extended cab truck. RPI 60. The briefcase was locked. RPI 61. Sgt. Tate then asked the Defendant if he had a key to the briefcase. RPI 61. The Defendant did not respond to the question. Id. Sgt. Tate then asked if the briefcase belonged to him, and the Defendant told him that he didn't own it, and that he didn't know who owned it. RP 61. Sgt. Tate told the Defendant that he was looking for "drug stuff" that could be in there, and it was in his truck. RPI 61-62. The Defendant told Sgt. Tate that he can't give me permission to open the briefcase because it's not his, and he objected to Sgt. Tate seizing the briefcase. Id. At that point, Sgt. Tate seized the briefcase. Id.

During the course of the search, officers recovered numerous items of evidentiary value. RPII 61 - 88, 184. The Defendant's fingerprints were found on a few items within the converted garage including a two flasks and a condenser tube. RPII 157. The items in which the Defendant's fingerprints were found were clean, and bore no residue of a controlled substance. RPII 130. A container holding

a clear colorless liquid over another clear colorless liquid was recovered and found to contain methamphetamine base. RPII 329-30, 352-354.

Subsequent to the search of the converted garage at 1101 ½ Cowlitz Way, Sgt. Tate obtained a search warrant to search the briefcase taken from the Defendant's truck. RPII 184. Inside the briefcase a baggy containing a white crystal substance was located, along with scales and a baggy of red powder. Id. The crystal substance found inside the briefcase tested by Jason Dunn and found to be methamphetamine hydrochloride. RPII 344-46.

Trial was held on December 22, 23, and 24, 2003. On the morning of trial, a hearing pursuant to CrR 3.5 was held. RPII 17-31. After the hearing, the court concluded that the Defendant was advised of his rights, and he obviously understood those rights because he chose to exercise them selectively. RPII 38.

During the course of Sgt. Tate's testimony, he explained that he spoke with the Defendant after the Defendant had been advised of his *Miranda* rights. RPII 177-178. Specifically, the testimony of Sgt. Tate as elicited by the State was as follows:

> Q: ... did you ask Mr. Evans, um, any questions regarding [the] clandestine methamphetamine lab?
>
> A: Yeah, I started to ask some of those questions. I asked

about, "You know, we're processing a lab here, um, do you want to talk to me about that?" I asked some of those type questions. I also asked about knowledge issues.

Q: Okay. What was – what exactly did he tell you with respect to, um, search that was being conducted at that time?

A: Um, he didn't answer specifically, um, about those other than to say we're going to do what we're going to do.

Although the Defendant's counsel did not object during the questioning, he moved for a mistrial out of the presence of the jury. RPII 209 - 214. The Defendant's motion was denied. RPII 295.

State's witness Bryan Kerr testified that he rented the residence at 1101 Cowlitz Way from the Defendant. RPII 265. He explained that other people had been living in the converted garage at 1101 ½ prior to the search. RPII268, 272. Kerr stated that he had helped the Defendant clear out the converted garage a couple of days before the search because the Defendant was going to rent the place out to Scott Strenz who stayed there for about three days, including the day of the search. RPII 266, 272. Kerr testified that when he helped the Defendant clear out the converted garage, none of the items indicative of a meth lab were present. RPII 270-271. Kerr also stated that the place was very tidy and did not smell of chemicals. Id.

Kerr also testified that he had borrowed the Defendant's truck that day, and in fact, gave the key to the officers during the course of the search warrant. RPII 272-73. Kerr denied ever seeing the Defendant with the briefcase, and explained that another person had also used the truck that day. RPII 272-3, 281.

Finally, Jason Dunn from the Washington State Patrol Crime Lab testified regarding the differences between methamphetamine and methamphetamine hydrochloride. RPII 352-353. He explained that methamphetamine is something distinct from methamphetamine hydrochloride, and that methamphetamine hydrochloride is a salt of methamphetamine. Id, at 352-53.

Mr. Dunn went on to testify that the Exhibit 12, which was the baggy of crystal substance located inside the locked briefcase, was revealed to be methamphetamine hydrochloride; while the tests on Exhibit 5-C, which was the container filled with a layered liquid, revealed methamphetamine base. Id, 329, 354.

At the conclusion of the trial, the Defendant was found guilty of manufacturing methamphetamine, and possessing methamphetamine with the intent to deliver. CP 150-158. At the urging of Defense counsel, the court concluded that the two offenses constituted the same criminal conduct. RPI 135. The court further concluded that

the maximum penalty for the Defendant's convictions was 10 years. RPI 135. The Defendant was subsequently sentenced within a standard range of 51-68 months to 60 months. CP 150-158.

ARGUMENT

I. THE TRIAL COURT'S RULING THAT THE DEFENDANT'S DENIAL OF OWNERSHIP OF THE BRIEFCASE CONSTITUTED AN ABANDONMENT OF PROPERTY VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, §7 OF THE WASHINGTON CONSTITUTION.

As an initial issue, under Washington law, defendants have "automatic standing" to challenge a search and seizure if: (1) possession is an essential element of the offense charged, and (2) the defendant was in possession of the item at the time it was seized or searched. *State v. Simpson*, 95 Wash.2d 170, 181, 622 P.2d 1199 (1980) The defendant in this case meets both requirements, and as such, has standing to object to the seizure and subsequent search of the briefcase found inside his vehicle.

Although there are several published opinions regarding the privacy interests, or lack thereof, in abandoned property, there seem to be no Washington cases that answer the question whether denial of ownership alone constitutes abandonment of property. However, other jurisdictions have answered this question.

While abandoned property is always subject to seizure, proof of intent to abandon must be shown. *Robles v. State*, 510 N.E.2d 660 (Ind.1987). Mere denial of ownership is not proof of an intent to

abandon. *People v. Cameron*, 73 Misc.2d 790, 342 N.Y.S.2d 773 (1973). For example, in *Robles v. State*, 510 N.E.2d 660 the defendant's statement that the bag he checked in with the airline was not owned by him did not constitute abandonment; he still had a reasonable expectation of privacy as the person transporting the bag. *Id.* Similarly, in *State v. Casey*, 59 N.C.App. 99, 296 S.E.2d 473 (1982) the defendant denied that the bags he was carrying in the airport were his, but the court concluded that he nevertheless had the right to exclude all others from the bags by virtue of his right of possession and control. *Id.* Consequently, there was no abandonment. *Id.*

In *State v. Huether*, 453 N.W.2d 778 (N.D.1990) the defendant was not found to have abandoned a bag containing controlled substances where he denied both ownership of the bag and knowledge of its contents. *Id.* The court found that the absence of abandonment was especially apparent where, as here, the paper bag is contained and controlled within an area where the accused has a legitimate expectation of privacy. *Id.*

One Washington State Division 2 case that touches upon this issue is *State v. Goodman*, 42 Wn.App. 331, 711 P.2d 1057 (Div. 2 1985). In that case, officers searched a defendant's trunk, and in

doing so, asked the defendant about a suitcase they found inside. *Goodman*, at 333. Goodman first denies knowing anything about the suitcase, then said it belonged to his passenger. *Id.* When officers asked the passenger about the suitcase, the passenger also denied knowing about it, then said he had found it along the roadway and was trying to find its owner. *Id.*

After finding that Goodman had standing to challenge the officer's eventual search of the suitcase, the court also noted, without further analysis, that "the State's assertions of voluntary abandonment" was "without factual support." *Goodman,* at 335. While arguably dicta, this conclusion clearly shows allegiance with the jurisprudence described above.

Accordingly, it is very clear that the lower court erred in finding that the Defendant in this case abandoned his privacy interests in the locked briefcase by merely denying ownership. What is more, like the defendant in *Huether*, the Defendant's privacy interest in the briefcase is even more compelling as it was found within an area where there is a legitimate expectation of privacy, that is, his truck. As such, the lower court's ruling should be reversed.

II. THE TRIAL COURT ERRED BY CONCLUDING THAT DETECTIVE COWAN'S OMISSION OF THE INFORMANT'S CRIMES OF DISHONESTY FROM HIS AFFIDAVIT DID NOT MATERIALLY AFFECT THE FINDING OF PROBABLE CAUSE.

The Search warrant in this case was based upon an affidavit presented by Detective Michael Cowan of the Cowlitz-Wahkiakum Drug Task Force. The information contained within that affidavit giving probable cause to search was provided by a named informant, Gary Lindsey. What is not included in the affidavit, is Lindsey's extensive criminal history of felony crimes of dishonesty.

Both before and after the trial, the Defense argued that by omitting Gary Lindsey's extensive history of crimes of dishonesty from his affidavit, Det. Cowan made a reckless misrepresentation, by omission, of a material fact to the issuing magistrate. These omissions were material since had the magistrate known about Mr. Lindsey's criminal history it is likely he would not have found him credible, as required by *Aguillar-Spinelli. Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). However, the lower court denied the Defendant's motion for a hearing under *Franks*, and instead determined that the omission was not material to the finding of probable cause. CP-36.

A search warrant may be issued only upon a determination of probable cause, which exists when an affidavit supporting the search warrant sets forth sufficient facts to lead a reasonable person to conclude that the defendant probably is involved in criminal activity. *In re Personal Restraint of Yim,* 139 Wash.2d 581, 594, 989 P.2d 512 (1999); *State v. Cord*, 103 Wash.2d 361, 365-66, 693 P.2d 81 (1985). However, if a defendant can show that an omission was made, with reckless disregard for the truth, which would have necessarily affected the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *Cord*, 103 Wash.2d at 367, 693 P.2d 81; *State v. Garrison*, 118 Wash.2d 870 at 873, 827 P.2d 1388 (1992). (The *Franks* test for material misrepresentations applies to allegations of material omissions.)

If the defendant makes this preliminary showing, and at the hearing establishes the allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit and a determination made whether as modified the affidavit supports a finding of probable cause. *Cord,* 103 Wash.2d at 367, 693 P.2d 81. If the affidavit fails to support probable cause, the warrant

will be held void and evidence obtained pursuant to it excluded. *Id.*

In the present case, the lower court concluded that Det. Cowan's omission of Mr. Lindsey's criminal history was not an omission likely to affect the issuing magistrate's determination of probable cause. CP-36. In other words, the omission, even if the product of recklessness, was not a material omission. However, consideration of *Aguillar-Spinelli*, and its progeny, as that doctrine applies to the facts of this case, indicate that Det. Cowan's omission was material, and as such, the court erred in not ordering a hearing.

Unquestionably, probable cause for a search warrant may be based upon information provided by an informant. *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); However, where an officer seeks to use information provided by an informant to establish probable cause, the officer's affidavit must furnish sufficient underlying facts from which a neutral magistrate could conclude that both the information and the informant are reliable. *Aguilar v. Texas,* 378 U.S. 108; *Spinelli v. United States,* 393 U.S. 410.

In evaluating information provided by an informant, courts in this state apply the *Aguilar-Spinelli* test. The *Aguilar-Spinelli* test is a two prong test that requires that before information provided by an informant can be used to establish probable cause for a warrant, the

informant's basis of knowledge and reliability must be established by information provided in the affidavit portion of the warrant application. See 2 Wayne R. LaFave, Search and Seizure: *A Treatise on the Fourth Amendment* §3.3, at 121 (3d ed. 1996). The "basis of knowledge" prong is satisfied where information shows that the informant personally saw the events and is passing on first hand information. *State v. Smith*, 110 Wash.2d 658, 663, 756 P.2d 722, 725 (1988); In the present case, the informant's basis of knowledge is not challenged, but rather, his veracity.

The veracity prong of the *Aguilar-Spinelli* test may be met if the affidavit supporting the search warrant contains sufficient facts from which a magistrate can independently determine the veracity of the informant. *State v. Paradiso*, 43 Wash.App. 1, 6, 714 P.2d 1193, 1196 (1986). An officer's conclusion that an informant is credible is not sufficient, but instead, the officer's reasons for drawing such a conclusion are required. *Aguilar*, 378 U.S. at 112, 84 S.Ct. At 1515, 12 L.Ed.2d at 727; *State v. Jackson*, 102 Wash.2d 432, 437, 688 P.2d 136 (1984).

The level of evidence necessary to establish the reliability prong of *Aguilar-Spinelli* depends upon which category of informant is in question. *State v. Northness,* 20 Wash.App. 551, 556-57, 582

P.2d 546 (1978). The lower court categorized Mr. Lindsey as a named citizen informant. CP-36. However, Mr. Lindsey is a criminal informant, and as such, the standards typically applied to professional informants better suits him. *Northness*, at 557. Factors that courts look for to provide indicia of reliability for this category of informant include a history of providing reliable information in the past, or a motive on the part of the informant to be truthful. *State v. Jackson, at 437; State v. Lund*, 70 Wash.App. 437, 439-40, 449-50, 853 P.2d 1379 (1993). Such a motive may come in the form of an offer by the state to receive a favorable sentence in exchange for truthful information. *Lund*, 70 Wash.App. 437, 439-40.

In the present case, the affidavit does not identify Gary Lindsey other than by giving his name. The affidavit does not provide his address or any other identifying data. Nor does the affidavit contain Lindsey's criminal history which consists of six (6) counts of Forgery; two (2) counts of Theft in the Second Degree. The affidavit does not state that Lindsey has any track record of providing information to the police. Lindsey has no indicia of reliability from previous contacts. The only police investigation conducted to corroborate Lindsey's assertions consisted of a check of the public access records to find that 1101 Cowlitz Way is owned by Danny W. Evans. Hence, the only

basis upon which the lower court could find sufficient indicia of veracity was in the fact that the issuing magistrate was informed that Mr. Lindsey would receive a reduced charge in exchange for truthful information. CP-28, p. 51.

While the Defendant cannot argue that a promise of lenity cannot provide sufficient basis to satisfy the veracity prong of *Aguilar-Spinelli,* in this particular case, there was also a substantial amount of information available to the State, but not made available to the magistrate, that would have severely undercut Mr. Lindsey's credibility, despite the promise of lenity.

Put another way, the issuing magistrate was denied the opportunity to balance the indicia of reliability presented against other indicia of unreliability. This full disclosure to the magistrate is most important in a case such as this were the only proof of veracity is one created by the State itself through a promise of lenity. Otherwise, the State is given the ability to create a credible informant on its own, regardless of any other factors known to the State that may severely undercut the informant's veracity. As such, by the lower court erred in denying the Defendant a *Franks* hearing.

III. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT UNDER RCW 69.50.401(a)(1)(ii) WHERE THE JURY WAS NOT ASKED TO SPECIFY WHICH SUBSTANCE WAS ATTRIBUTED TO THE DEFENDANT'S ACTS THEREBY VIOLATING THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATE'S CONSTITUTION.

Lab technician Jason Dunn clearly explained during his testimony that the baggy found inside the briefcase contained methamphetamine hydrochloride, while the layered liquid found inside the converted garage contained methamphetamine base. Mr. Dunn also testified that methamphetamine and methamphetamine hydrochloride are distinct compounds and not one in the same.

Most importantly, RCW 69.50.401 (See Appendix A) also distinguishes between the forms of these substances by way of providing different penalties depending on whether the substance in question is pure methamphetamine, or its salts or isomers, or salts of its isomers. RCW 69.50.401(a)(1)(ii) provides that any person who manufactures, delivers, or possesses with the intent to deliver or manufacture methamphetamine, is guilty of a crime punishable of up to ten years. On the other hand, 69.50.401(a)(1)(iii) provides that the same conduct bears a maximum penalty of five years if the controlled substance is methamphetamine, its salts, isomers, and salts of its isomers. See RCW 69.50.206(d)(2)(Schedule II, Appendix B).

This distinction in the sentencing guidelines is of grave importance in this case since it is unknown which substance the jury found the Defendant guilty of manufacturing or possessing with intent to deliver. In other words, because no special verdict or unanimity instruction was provided to the jury it is unknown which sentencing provision of RCW 69.50.401(a)(1) is applicable to the Defendant.

In *Blakely v. Washington*, 542 U.S. ____ (2004) the United States Supreme Court recently held that since the facts supporting a defendant's exceptional sentence were neither admitted by him nor found by a jury, the sentence violated his Sixth Amendment right to a jury trial. *Blakely*, at 5-18. Although an exceptional sentence is not at issue in the case, the analysis is the same. This is true since the Defendant's appropriate sentence turns on the facts found at trial. Because the jury was not asked to specify the substance attributed to each crime, the trial court was left to decide. This is a result clearly prohibited by the holding of *Blakely,* and contrary to the Defendant's Sixth Amendment rights.

IV. THE STATE VIOLATED THE DEFENDANT'S FIFTH AMENDMENT RIGHTS BY ELICITING TESTIMONY THAT THE DEFENDANT EXERCISED HIS RIGHT TO REMAIN SILENT.

The right to remain silent, or the privilege against self-incrimination, is based upon the Fifth Amendment of the United

States Constitution, which provides in pertinent part that "[n]o person ... shall be compelled in any criminal case to be a witness against himself...." *State v. Sweet,* 138 Wn.2d 466, 980 P.2d 1223, 1231,, (Wash. 1999). "The purpose of the right is ... 'to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.' " *Id.*

Once a suspect is arrested and *Miranda* rights are read, the State violates a defendant's Fifth and Fourteenth Amendment rights by introducing evidence that he exercised his right to remain silent as substantive evidence of guilt. *State v. Lewis*, 130 Wash.2d 700, 705, 927 P.2d 235 (1996); *State v. Easter*, 130 Wash.2d 228, 236, 922 P.2d 1285 (1996). This principal exists since the State, in advising an accused of these rights, implicitly assures that accused person that he may assert his rights without penalty. *Doyle v. Ohio*, 426 U.S. 610, 618-19, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Easter*, 130 Wash.2d at 238, 922 P.2d 1285. Because this claim constitutes a manifest constitutional error, review is de novo . *State v. Curtis*, 110 Wash.App. 6, 11, 37 P.3d 1274 (2002).

A criminal defendant's assertion of his constitutionally protected due process rights is not evidence of guilt. *State v. Lewis*,

130 Wash.2d 700, 705 (1996). The State may not, therefore, invite a jury to infer that a defendant is more likely guilty because he exercised his constitutional rights. *State v. Nelson*, 72 Wash.2d 269, 285, 432 P.2d 857 (1967). The inference always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial. *Id.* Hence, in evaluating the error, it is critical to distinguish between instances where the evidence in question came in as a non-responsive answer to a question not designed to elicit the comment; or instead as either a response to a direct question designed to elicit such a comment, or during argument by the State. *State v. Curtis*, 110 Wn.App. 6.

Curtis, is instructive and bears facts similar to those at bar. In that case, the testimony in question was presented as follows:

Q: Go ahead. And you had him – once he got out, then you --

A: I read him his *Miranda*, his constitutional rights.

Q: Was anything said at that time?

A: He refused to speak to me at the time, and wanted an attorney present.

Curtis, at 9.

In reversing the defendant's conviction, the court found it

significant that although the State did not argue to the jury in closing statements that guilt could be inferred from the defendant's silence, the testimony in question was nonetheless clearly elicited by the prosecutor during questioning. *Curtis*, at 13. Also important to the court was the fact that Mr. Curtis baldly asserted the right not to answer questions and to have a lawyer. *Id.*

Important to the court in *Curtis* was that the prosecutor knew that the question asked would elicit the fact that Mr. Curtis chose to remain silent. *Curtis*, at 14. Further, the court concluded, the question and answer were injected into the trial for no discernable purpose other than to inform the jury that the defendant refused to talk to the police. *Id.* Consequently, the court concluded that the State violated Curtis's rights under the Fifth and Fourteenth Amendments. *Id.*

Similarly, in the Ninth Circuit case of *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir. 1978) the prosecutor elicited the following from a police witness:

"Q. Who arrested Mr. Douglas?

A. I did.

Q. Did he make any statements to you?

A. No.

Prosecutor: That's all the questions I have."

Id, quoting Trial Tr. At 158-59.

The court held that this was just the sort of inquiry forbidden by the Supreme Court in *Miranda. Douglas v. Cupp, 578 F.2d 266, 267; See also Curtis,* 110 Wn.App. at 14. Even without an explicit reference to *Miranda*, the court concluded that the prosecutor had purposefully elicited the fact of silence after arrest. *Curtis, 110 Wn.App. at 14.* The court held that this in itself was an impermissible penalty on the exercise of the right to remain silent, from which a juror might have inferred that the defendant was guilty and his defense fabricated. *Id.* The court reversed, because it could not say as a matter of law that the question was harmless beyond a reasonable doubt. *Id., citing Douglas v. Cupp*, 578 F.2d 266, 267.

In the case at bar, the exchange between the prosecutor and Sgt. Tate was presented to the jury as follows:

> Q: . . . did you ask Mr. Evans, um, any questions regarding [the] clandestine methamphetamine lab?
>
> A: Yeah, I started to ask some of those questions. I asked about, you know, we're processing a lab here, um, do you want to talk to me about that? . . . I also asked about knowledge issues.
>
> Q: Okay. What was – what exactly did he tell you with respect to, um, [the] search that was being conducted at that time?
>
> A: Um, he didn't answer specifically, um, about those other than to say we're going to do what we're going to do.

What is clear from this exchange is that the Defendant clearly refused to answer the direct inquiries posed by Sgt. Tate. What is also clear is that the Defendant's refusal to answer was purposefully elicited by the deputy prosecutor. What legitimate purpose could the offering of such evidence have except to give the jury something by which to infer that because the Defendant did not explain himself, or deny knowledge of the lab, he must be guilty. Such conduct by the government is strictly prohibited, as the above case law clearly shows.

Constitutional error is presumed to be prejudicial, and the State bears the burden of proving the error harmless. *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). To overcome this presumption of prejudice, the State must show that the untainted evidence overwhelmingly supports a guilty verdict. *Id.* at 426; *Easter*, 130 Wash.2d at 242; *State v. Heller*, 58 Wash.App. 414, 421, 793 P.2d 461 (1990).

Here, the State cannot contend that the untainted evidence is so overwhelming that the Defendant's conviction must be affirmed. While the evidence was undisputed that the Defendant owned the property in question, that fact alone cannot support a conviction in this case. There was evidence from the State's own witnesses that the Defendant had someone else living in the dwelling at the time. What

is more, this same State witness, Mr. Kerr, also claimed that he had been in possession of the Defendant's truck that day, and the State's evidence further implied that Mr. Kerr had knowledge of the contents of the briefcase. The jury certainly could have inferred that the briefcase and its contents belonged to Mr. Kerr, and not the Defendant, had the Defendant's choice not to answer questions regarding the lab, or knowledge of the lab, not been presented before the jury.

The truth of the matter, however, is that it is impossible to know what effect this evidence may have had upon the jury's decision making process, but there is no question that such information added to the State's case, and was therefore prejudicial. *State v. Nelson*, 72 Wash.2d 269, 285. *Douglas v. Cupp*, 578 F.2d 266, 267. Accordingly, the Defendant's convictions should be reversed, and this matter remanded for a new trial.

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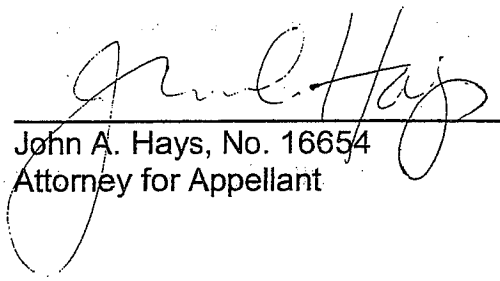
CONCLUSION

Based upon the arguments above, the Appellant respectfully requests that the reviewing court reverse his convictions and remand this matter for further proceedings.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX A

69.50.401. Prohibited acts: A--Penalties (Effective until July 1, 2004)

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

(I) a controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(v) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(b) Except as authorized by this chapter, it is unlawful for any person to create, deliver, or possess a counterfeit substance.

(1) Any person who violates this subsection with respect to:

(I) a counterfeit substance classified in Schedule I or II which is a narcotic drug, or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(ii) a counterfeit substance which is methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(iii) any other counterfeit substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a counterfeit substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(v) a counterfeit substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

©) It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other liquid, substance, or material in lieu of such controlled substance. Any person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(d) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

(e) Except as provided for in subsection (a)(1)(iii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.

(f) It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. A violation of this subsection shall be punished as a class C felony punishable in accordance with > RCW 9A.20.021.

This section shall not apply to offenses defined and punishable under the provisions of > RCW 69.50.410.

APPENDIX B

69.50.206. Schedule II

(a) The drugs and other substances listed in this section, by whatever official name, common or usual name, chemical name, or brand name designated, are included in Schedule II.

(b) Substances. (Vegetable origin or chemical synthesis.) Unless specifically excepted, any of the following substances, except those listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts, but including the following:

(I) Raw opium;

(ii) Opium extracts;

(iii) Opium fluid;

(iv) Powdered opium;

(v) Granulated opium;

(vi) Tincture of opium;

(vii) Codeine;

(viii) Ethylmorphine;

(ix) Etorphine hydrochloride;

(x) Hydrocodone;

(xi) Hydromorphone;

(xii) Metopon;

(xiii) Morphine;

(xiv) Oxycodone;

(xv) Oxymorphone; and

(xvi) Thebaine.

(2) Any salt, compound, isomer, derivative, or preparation thereof that is chemically equivalent or identical with any of the substances referred to in subsection (b)(1) of this section, but not including the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves including cocaine and ecgonine, and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(5) Methylbenzoylecgonine (cocaine--its salts, optical isomers, and salts of optical isomers).

(6) Concentrate of poppy straw (The crude extract of poppy straw in either liquid, solid, or powder form which contains the

phenanthrene alkaloids of the opium poppy.)

©) Opiates. Unless specifically excepted or unless in another schedule, any of the following synthetic opiates, including its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation, dextrorphan and levopropoxyphene excepted:

(1) Alfentanil;

(2) Alphaprodine;

(3) Anileridine;

(4) Bezitramide;

(5) Bulk dextropropoxyphene (nondosage forms);

(6) Carfentanil;

(7) Dihydrocodeine;

(8) Diphenoxylate;

(9) Fentanyl;

(10) Isomethadone;

(11) Levomethorphan;

(12) Levorphanol;

(13) Metazocine;

(14) Methadone;

(15) Methadone--Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;

(16) Moramide--Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid;

(17) Pethidine (meperidine);

(18) Pethidine--Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

(19) Pethidine--Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

(20) Pethidine--Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(21) Phenazocine;

(22) Piminodine;

(23) Racemethorphan;

(24) Racemorphan;

(25) Sufentanil.

(d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) Methamphetamine, its salts, isomers, and salts of its

isomers;

(3) Phenmetrazine and its salts;

(4) Methylphenidate.

(e) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital;

(2) Glutethimide;

(3) Pentobarbital;

(4) Phencyclidine;

(5) Secobarbital.

(f) Hallucinogenic substances.

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a United States Food and Drug Administration approved drug product. (Some other names for dronabinol [6aR-trans]-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-diben zo[b,d]py ran-i-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol.)

(2) Nabilone: Some trade or other names are (±)-trans3-(1,1-dimethlheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6 ,6-dimethy l-9H-dibenzol[b,d]pyran-9-one.

(g) Immediate precursors. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:

(i) Phenylacetone: Some trade or other names phenyl-2-propanone, P2P, benzyl methyl ketone, methyl benzyl ketone.

(2) Immediate precursors to phencyclidine (PCP):

(i) 1-phenylcyclohexylamine;

(ii) 1-piperidinocyclohexanecarbonitrile (PCC).

The controlled substances in this section may be rescheduled or deleted as provided for in > RCW 69.50.201.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	
Respondent,	**NO. 02-1-01358-6**
vs.	**COURT OF APPEALS NO: 31451-7-II**
DANNY WAYNE EVANS,	**AFFIDAVIT OF MAILING**
Appellant.	

STATE OF WASHINGTON)
) **ss.**
COUNTY OF COWLITZ)

CATHY RUSSELL, being duly sworn on oath, states that on the **2ND day of SEPTEMBER, 2004**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR
COWLITZ COUNTY PROSECUTING ATTORNEY
312 S.W. 1ST STREET
KELSO, WA 98626

DANNY W. EVANS
1103 COWLITZ WAY
KELSO, WA 98626

and that said envelope contained the following:

1. BRIEF OF APPELLANT
2. AFFIDAVIT OF MAILING

DATED this 2ND day of SEPTEMBER, 2004.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 2nd day of SEPTEMBER, 2004.

JENNIFER M ENGKRAF NOTARY PUBLIC COMMISSION EXPIRES JULY 22, 2008 STATE OF WASHINGTON

Jennifer M. Engkraf
NOTARY PUBLIC in and for the State of Washington,
Residing at: Kelso, WA
Commission expires: 7/22/08

John A. Hays
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1402 Broadway
Longview, WA 98632
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